FILED

961401 MAR 4 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1996

DIMENSIONS MEDICAL CENTER, LTD.,

Petitioner,

vs.

ILLINOIS HEALTH FACILITIES PLANNING BOARD; ILLINOIS DEPARTMENT OF PUBLIC HEALTH; FOOT AND ANKLE SURGICAL CENTER; WEIL PODIATRY SERVICES, LTD.; and LOWELL SCOTT WEIL, DPM.,

Respondents.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

PETITION FOR A WRIT OF CERTIORARI

ANDREW J. CREIGHTON
Counsel of Record
ALLYSON BOULDON
Attorneys for Petitioner
960 Rand Road
Suite 201
Des Plaines, Illinois 60016
(847) 390-9250

70676

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz Appellate Services, Inc.

QUESTIONS PRESENTED FOR REVIEW

1. Was the Notice by Publication sufficient to meet the due process requirement of the Fourteenth Amendment of the United States Constitution?

2. Does the evidence in the record support the decision that the Petitioner was given notice and opportunity to be heard as required by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States?

STATEMENT PURSUANT TO RULE 29.6

Petitioner has no parent company nor wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Citations	v
Opinions Below	1
Statement of Jurisdiction.	2
Constitutional Provision and Statute Involved	2
How the Federal Question was Raised	3
Statement of the Case	4
A. The Parties	4
B. The Regulatory Scheme and Statutes	4
C. Notice Requirements	5
D. History of Proceedings	6
E. Original Complaint in Administrative Review	7
F. The Administrative Hearing	8
G. The Amended Complaint	11

Contents

	Page
Reasons for Granting the Writ	12
I. Notice By Publication Is Constitutionally Insufficient To Afford Due Process With Respect To An Individual Whose Name And Address Is Known.	12
II. The Evidence In The Record Does Not Support The Decision That The Petitioner Received Notice And Opportunity To Be Heard.	13
A. The Illinois Health Facilities Planning Board Disregarded Its Own Rules By Failing To Provide Individual Notice To Affected Parties By Mail.	13
B. The Record Does Not Support The Decision That Notice Was Mailed To Petitioner.	14
1. Denial Of Receipt Rebuts The Presumption That A Notice Was Mailed.	14
2. Proof Of Customary Practice Is Insufficient To Establish Mailing On A Particular Occasion.	16
3. There Is No Corroboration That Notice Was Mailed.	19
Conclusion	21

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Armstrong v. Manzo, 380 U.S. 545 (1965) 12

Balmoral Racing Club v. Ill. Racing Bd., 151 Ill. 2d 367, 603 N.E. 2d 489 (1992) 12

Brown Bag Co. v. Bituminous Gas Corp., 117 Ill. App. 2d 287, 254 N.E. 2d 577 (1st Dist. 1969) 15

Estate of Anderson, 246 III. App. 3d 116, 615 N.E. 2d 1197 (4th Dist. 1993) 15

Finley v. Mercer County, 172 III. App. 3d 30, 526 N.E. 2d 635 (3rd Dist. 1988) 15

Goetz v. Country Mutual Insurance Co., 28 Ill. App. 3d 154, 328 N.E. 2d 109 (2nd Dist. 1975) 15, 16, 19

M.S. Kaplan Co. v. Cullerton, 49 III. App. 3d 374, 364 N.E. 2d 381 (1st Dist. 1977) 19

Orrway Motor Service v. Illinois Commerce Commission, 40 III. App. 3d 869, 353 N.E. 2d 253 (1st Dist. 1976) 15

Placko v. Jackson, 197 Ill. App. 3d 138, 554 N.E. 2d 708 (2nd Dist. 1990) 3, 7, 14, 19

Contents

	Page
Robinson v. Hanrahan, 409 U.S. 38 (1972)	3, 12
Rodriguez v. Koschny, 57 Ill. App. 3d 355, 373 N.E. 2d 47 (2nd Dist. 1978)	12
Thomas v. Industrial Commission, 78 Ill. 2d 327, 399 N.E. 2d 1322 (1980)	14
Thompson v. City of Louisville, 362 U.S. 199 (1960) .	21
Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988)	3, 13
Willett Motor Coach v. Board of Education, 103 Ill. App. 3d 760, 431 N.E. 2d 1190 (1st Dist. 1981)	17, 19, 20

Statutes Cited:

28 U.S.C. § 1257	2
5 ILCS 70/1.25	19
20 ILCS 3960, *et seq.*	4
20 ILCS 3960/8	2, 5
20 ILCS 3960/12	5
77 Ill. Admin. Code, Sec. 5	5
77 Ill. Admin. Code, Sec. 8	5, 20

Contents

	Page
77 Ill. Admin. Code, Sec. 1100, *et seq.*	5
77 Ill. Admin. Code, Sec. 1110(P)	5
77 Ill. Admin. Code, Sec. 1200	5, 10, 13
77 Ill. Admin. Code, Sec. 1200.30	6, 14
77 Ill. Admin. Code, Sec. 1200.30(b)	20
77 Ill. Admin. Code, Sec. 1200.30(c)	5
77 Ill. Admin. Code, Sec. 1200.40	6
77 Ill. Admin. Code, Sec. 1200.40(a)	6
77 Ill. Admin. Code, Sec. 1200.50	6
77 Ill. Admin. Code, Sec. 1230(c)	11, 13
United States Constitution Cited:	
Fourteenth Amendment	i, 2, 3, 21

APPENDIX

Appendix A — Letter from the Clerk of the Illinois Supreme Court to Andrew J. Creighton Denying Petition for Leave to Appeal Dated December 4, 1996 ..... 1a

Contents

Page

Appendix B — Order of the Appellate Court of Illinois, First Judicial District Entered September 10, 1996 ..... 2a

Appendix C — Summary Order of the Appellate Court of Illinois, First Judicial District Dated August 15, 1996 ..... 4a

Appendix D — Order of the Circuit Court of Cook County, Illinois County Department, Chancery Division Entered August 4, 1995 ..... 7a

Appendix E — Transcript of Proceedings Before the State of Illinois, Health Facilities Planning Board Held June 30, 1994 ..... 13a

Appendix F — Hearing Officer's Report and Recommendation from the Illinois Health Facilities Planning Board, State of Illinois Dated June 13, 1994 ..... 17a

The Petitioner, Dimensions Medical Center, Ltd., an Illinois Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, First Judicial District.

OPINIONS BELOW

On June 13, 1994, an administrative law judge entered a Report and Recommendation finding that the Illinois Health Facilities Planning Board had acted properly concerning an application for a certificate of need by mailing notice and arranging publication in a local newspaper. A copy of the Report and Recommendation is reprinted in the Appendix at App. F.

On June 30, 1994, the administrative agency, the Illinois Health Facilities Planning Board adopted the administrative law judge's report as its own decision. A copy of the Board's action is reprinted in the Appendix at App. E.

On August 4, 1995 upon administrative review, the Circuit Court of Cook County, Illinois issued a Memorandum Order affirming the Board's decision. A copy of that Order is reprinted in the Appendix as App. D.

On August 15, 1996, the Illinois Appellate Court issued an Order affirming the decision of the Circuit Court. A copy of that Order is reprinted in the Appendix as App. C.

On September 10, 1996, the Appellate Court issued an Order denying Petitioner's Motion for Rehearing. A copy of that Order is reprinted in the Appendix as App. B.

On December 4, 1996, the Supreme Court denied Petitioner's Petition for Leave to Appeal. A copy of that decision is reprinted in the Appendix at App. A. None of these decisions was published.

STATEMENT OF JURISDICTION

Petition for Leave to Appeal to the Supreme Court of Illinois was denied on December 4, 1996. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment of the Constitution of the United States states in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . without due process of law. . . .

The Illinois Health Facilities Planning Act, 20 ILCS 3960/8 (1992) states in part:

* * *

> When an application for a permit is initially reviewed by a recognized area wide health planning organization or the Agency, as herein provided, the organization or the Agency, as the case may be, shall afford an opportunity for public hearing within a reasonable time after receipt of the complete application, not to exceed 90 days. Notice of such hearing shall be made promptly by certified mail to the applicant and, within 10 days of the hearing, by publication in a newspaper of general circulation in the area or community to be affected. Such hearing

> shall be conducted in the area or community where the proposed project is to occur, and shall be for the purpose of allowing the applicant and any interested person to present public testimony concerning the approval, denial, renewal or revocation of the permit. All interested persons attending such hearing shall be given reasonable opportunity to present their views or arguments in writing or orally, and a record of all such testimony shall accompany any recommendation of the Agency or the recognized area wide health planning organization for the issuance, denial, revocation or renewal of a permit to the State Board. The State Board shall promulgate reasonable rules and regulations governing the procedure and conduct of such hearings.

* * *

HOW THE FEDERAL QUESTION WAS RAISED

At the earliest possible stage of the proceedings below, the Petitioner raised the issue of denial of due process because of lack of notice as well as the insufficiency of publication as adequate notice before the Circuit Court of Cook County, Illinois, Case No. 93 CH 1294. Petitioner argued that it had been denied due process of law citing *Placko v. Jackson,* 197 Ill. App. 3d 138, 554 N.E. 2d 708 (2nd Dist. 1990); *Robinson v. Hanrahan,* 409 U.S. 38 (1972) and *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478 (1988). Each of these cases relied upon the Fourteenth Amendment. The issue was again raised before both the Illinois Appellate Court and in the Petition for Leave to Appeal filed before the Illinois Supreme Court.

STATEMENT OF THE CASE

A. The Parties

Petitioner, Dimensions Medical Center, Ltd. (Dimensions) owns and operates an ambulatory surgical treatment center (ASTC) at 1455 Golf Road, Des Plaines, Illinois. Dimensions is a full service ambulatory surgical facility which provides diverse out-patient surgical procedures including podiatric services. Respondents Foot and Ankle Surgical Center, Weil Podiatry Services, Ltd., and Lowell Scott Weil, DPM (collectively referred to as Weil) filed an application in May 1992 before the Illinois Health Facilities Planning Board to establish an ambulatory surgical treatment center to provide podiatric services at the same building, 1455 Golf Road, Des Plaines, approximately 100 feet down the hall from Dimensions existing center. Respondent Illinois Health Facilities Planning Board (Board) is an administrative agency empowered by the Health Facilities Planning Act to review applications for certificates of need to build and operate health facilities. The Illinois Department of Public Health (IDPH) evaluates applications for Certificate of Need filed by health care providers.

B. The Regulatory Scheme And Statutes

The Illinois Health Facilities Planning Act, 20 ILCS 3960, *et seq.* (Act), was adopted by the Illinois legislature for the purpose of controlling increases in costs of health care resulting from unnecessary construction or modification of health care facilities. (Sec. 2). The Act requires that any new facility must first be approved pursuant to a review process by the Illinois Health Facilities Planning Board. In furtherance of this goal, the Board is authorized to promulgate rules, regulations, standards, and criteria for evaluating applications to build or

modify health care facilities. 20 ILCS 3960/12. The regulations enacted by the Board are contained in 77 Ill. Admin. Code, Sec. 1100, *et seq.* If the Board finds that the applicant meets the statutory criteria, a Certificate of Need (CON) is issued permitting the facility to be constructed. (Sec. 8). Out-patient surgical centers called Ambulatory Surgical Treatment Centers (ASTC's) are subject to approval by the Board. (Sec. 5, 77 Ill. Admin. Code, Sec. 1110 (P)(1992)).

C. Notice Requirements

The Illinois Health Facilities Planning Act requires that an opportunity for a public hearing shall be provided before an application for a Certificate of Need is approved or denied. The purpose of the public hearing is to allow the applicant or any interested party to present public testimony concerning approval or denial of the application. 20 ILCS 3960/8. The Act requires that publication of the opportunity for public hearing be published in a local paper and that the Board adopt rules for additional notice. The purpose of the notice requirement is to allow any interested person to present public testimony in opposition or support of the application. (Sec. 8).

Title 77 Illinois Administrative Code Section 1200 contains the notice procedures for public hearings before the Illinois Health Facilities Planning Board. These rules were adopted by the Board under authority of Section 8 of the Health Facilities Planning Act. Section 1200.30(c) requires that upon the completion of an application for a Certificate of Need, notice by regular mail shall be sent to each "affected person." "Affected person" is defined by that section to include existing health care facilities located in the health service area providing similar services as those of the proposed project. *Ibid.* Petitioner was an "affected person" and entitled to notice of Weil's application by regular mail. C-730. The reason for the mailing is to advise

affected parties of their right to request a public hearing and to contest the application. 77 Ill. Admin. Code, Sec. 1200.30 (1992). The notice of opportunity to request a public hearing is mailed by the Board only after it deems an application complete. A recipient of the notice has 15 days within which to request a public hearing. 77 Ill. Admin. Code, Sec. 1200.30 and 1200.40. The request for hearing must be received in the time period set forth in the notice. 77 Ill. Admin. Code, Sec. 1200.40(a). After a public hearing has been requested, the rules provide for recorded testimony before a hearing officer. There is also the right to counsel and the right to present testimony and examine witnesses. 77 Ill. Admin. Code, Sec. 1200.50.

D. History Of Proceedings

In May 1992, Foot and Ankle mailed a letter of intent to apply for a certificate of need to build a podiatric surgical center at 1455 Golf Road, Des Plaines, Illinois. C-760. Dimensions, in a letter to Weil dated June 17, 1992, with a copy to the Board, objected to the application because it would cause unnecessary duplication of services and facilities as Dimensions already provided podiatric surgery. C-760. Dimensions' personnel were aware that under the Board's procedures, when Weil's application was deemed complete, "affected persons" being other health care providers in the area, including Dimensions, would be notified by mail of the right to request a public hearing concerning the application. 77 Ill. Admin. Code, Sec. 1200.30 and 1200.40.

Shortly before January 11, 1993, the Board published its agenda for the January 13-14, 1993 meeting which included Weil's application for approval. C-1358.

On January 11, 1993, when Dimensions received the agenda, it requested and received by overnight delivery a copy of Weil's completed application. C-1359-60. Dimensions immediately served by fax and personal delivery a request for continuance on the Board alleging it was an affected party and that it had not received notice of opportunity to request a public hearing concerning Weil's application. C-477-60. The request for continuance contained letters which additionally stated that Dimensions was already operating a full service ASTC in the same building 100 feet down the hall from the proposed facility and that Dr. Weil had been performing podiatric surgeries at Dimensions' facility since April, 1992. C-454, C-460. The request for continuance contained a page from Weil's application which falsely stated that Dimensions' had no podiatrists on staff. C-459. A list containing the names of podiatrists on Dimensions' staff was also included C-458 as well as the signature page from Weil's personal service agreement with Dimensions. C-457. Also attached was a letter from Dimensions to Weil agreeing to raise fees at Weil's request. C-456. The Board, at the agenda meeting, refused to permit Dimensions' attorney representative to address the Board. C-465-6.

E. Original Complaint In Administrative Review

Petitioner timely filed an action for administrative review on February 10, 1993. C-2-30. After argument and briefing on the complaint, the Circuit Court judge relying on *Placko v. Jackson,* 197 Ill. App. 3d 138, 554 N.E. 2d 708 (2nd Dist. 1990) remanded the case to the Board for an evidentiary hearing concerning the issue of whether or not Petitioner had been provided proper notice. C-616.

The Board assigned the case to an administrative law judge for hearing and testimony and introduction of evidence.

F. The Administrative Hearing

Before the Administrative Law Judge Frank Gaughn at the hearing on May 23, 1994, the following evidence was introduced.

Alan Snider testified that he is Executive Director of Dimensions Medical Center. C-690. On January 11, 1993, Dimensions received an agenda from the Illinois Health Facilities Planning Board for its meeting on January 14-15, 1993. The Board was telephoned by Dimensions and it was verified that Weil's application was on the agenda for consideration. C-694. This was the first time Dimensions was aware that an application had been filed. C-699. Dimensions immediately sent letters to the Board informing it that Dimensions had not received notice of opportunity to request a public hearing. C-694-5. Weil's application was requested and sent by overnight delivery to Dimensions. C-742-1. No public hearing was held concerning Weil's application and a search of Dimensions' records did not locate a notice of opportunity to request a public hearing from the State. C-695-6.

Steve Melega testified that he is associate executive director of Dimensions Medical Center. C-704. His responsibility included reviewing incoming mail concerning regulatory matters from the Department of Public Health. C-705. The first time he was aware that Weil had filed an application for a CON was when Dimensions received the agenda for the January 14, 1993 meeting of the Illinois Health Facilities Planning Board. C-706. No notice of opportunity to request a public hearing was received. C-707-708. He had no knowledge that Weil had filed an actual application prior to receiving the Board's agenda on January 11, 1993. C-714.

On direct examination, Ray Passeri testified he is Executive Secretary of the Illinois Health Facilities Planning Board. He

supervises the 16 individuals who are responsible for carrying out the certificate of need program. C-717.

Mr. Passeri received a letter by fax from Dimensions on January 11, 1993 requesting a public hearing on the Weil application. C-718. The letter stated that Dimensions had not received a Notice of Request for Public Hearing. It stated that the Weil application was for an ASTC to be located in the same building on the same floor about 100 feet from Dimensions' fully licensed ASTC. The letter stated that Dr. Weil had performed over 100 surgeries at Dimensions' facility. Dimensions requested the Board to postpone any decision on the Weil application at the January 14, 1993 agenda meeting. C-761.

Mr. Passeri is familiar with the general procedure for certificate of need applications. There is no one individual who is responsible for the entire notice procedure. It is assigned to a support group of one supervisor and three employees. C-720-1. Exhibit A4 (C-767) is the Notice of Opportunity to Request Public Hearing which should be distributed by mail to affected persons. The next page (C-768) is the newspaper publication. C-722. The next pages (C-769-72) are the invoice, payment, and publication certification for the notice. C-723. The legal notice (C-772) was published on October 28, 1992 in the Des Plaines Journal. C-724.

One page (C-777) is a copy of what would be a mailing label to Dimensions. It was placed in the file to show documentation of samples of how mailings of legal notice occur. Normally a list of mailing labels is not included in the application file and these were added to the file afterwards. C-725-6.

When an application is deemed completed, a notice offering an opportunity to request a public hearing is published in the

newspaper. Additionally, there is a separate notice mailed to each individual interested party providing similar services to the applicant. The notices for opportunity for public hearing are attached to sheets with mailing labels on them and are folded and stamped. C-726. They are then deposited in the mail baskets on the Board's personal desks and picked up by Department employees who send them to the mailroom. Then they are distributed from the Department mailroom. C-727.

As far as Mr. Passeri knows, publication and mailing to affected parties including Dimensions was accomplished for the Weil application. C-727.

On cross examination, Mr. Passeri testified that he is familiar with 77 Illinois Administrative Code, Section 1200 which sets forth procedures for giving notice for a certificate of need application. It states what should be contained in the notice and a list of parties who should receive the notice. C-728-9. The rule requires individual notice to "affected persons" which includes Dimensions because it is a provider of similar services. Golf Surgical Center in Des Plaines also is an "affected person" entitled to individual notice. C-730.

There is a series of mailing labels in the record (C-793-867). These were prepared after the permit was issued. Mr. Passeri did not know when this was done. He asked the support staff to generate a copy of everyone that would have received notice. C-731. The list is a computer program of some kind done by Planning Area. Every facility with a permit should be on the list. C-732.

The record is a complete list generated by his office. The notice to the applicant, Foot and Ankle, did not go certified mail, but by first class. C-734. There is no rhyme or reason to the order of the list. He asked the staff to generate it.

Mr. Passeri asked his staff why the type for the Dimensions' label was different from the type of most of the other labels. They said that the type face had been set up a few years ago when the lists were originally worked in August, 1991, when the board relocated its office. They had different equipment from that time on. C-735. Golf Surgical Center has a permit from his office. Mr. Passeri could not find a mailing label for Golf or any of the state representatives they were required to mail notice to. C-738. Section 1230(c) identifies agencies or affected persons, state senators and representatives, and local health departments who are entitled to individual notice. Mr. Passeri did not know if the Des Plaines Board of Health got a notice. No public hearing was requested for Weil's application and none was held. C-740.

No other witnesses were called. Various documents were admitted into evidence. The Administrative Law Judge on June 13, 1994, issued a Report and Recommendation which concluded that the Board had followed its rules by mailing a copy of the Notice of Opportunity to Request a Public Hearing to Dimensions but that Dimensions did not receive the Notice. However, since the Board had published the Notice in the Des Plaines Journal, Dimensions had "constructive notice" of its right to request a public hearing.

The Illinois Health Facilities Planning Board on June 30, 1994, adopted the Administrative Law Judge's Report as its own decision. C-14, 69-72.

G. The Amended Complaint

Dimensions, on December 14, 1994, filed an Amended Complaint for Administrative Review seeking reversal of the Board's decision and requesting that the Certificate of Need to Weil be declared null and void. C-1408-1417. That Amended Complaint was briefed and argued before the Circuit Court. On

August 4, 1995, the court issued a Memorandum Order affirming the decision. C-1633-7.

The Appellate Court entered a Summary Order affirming the decision of the Circuit Court. The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal on December 4, 1996.

REASONS FOR GRANTING THE WRIT

The requirements of notice and opportunity to be heard are the fundamental principles of procedural due process. *Balmoral Racing Club v. Ill. Racing Bd.*, 151 Ill. 2d 367, 603 N.E. 2d 489 (1992). Petitioner respectfully requests that this Court consider the record of this case because it was denied those fundamental rights.

I.

NOTICE BY PUBLICATION IS CONSTITUTIONALLY INSUFFICIENT TO AFFORD DUE PROCESS WITH RESPECT TO AN INDIVIDUAL WHOSE NAME AND ADDRESS IS KNOWN.

The hearing officer found Dimensions had "constructive notice" by newspaper publication. Both the Board, and the Circuit and Appellate Courts, adopted this finding. C-1456-7, 1469-72. A notice by publication is insufficient to afford due process with respect to an individual whose name and address is known or easily ascertainable. *Rodriguez v. Koschny,* 57 Ill. App. 3d 355, 373 N.E. 2d 47 (2nd Dist. 1978); *Robinson v. Hanrahan,* 409 U.S. 38 (1972); *Armstrong v. Manzo,* 380 U.S. 545 (1965). Therefore, the Illinois Health Facilities Planning Board's decision that Dimensions received notice by publication is insufficient as a matter of procedural due process.

Furthermore, the time period between publication and the time that the Board must receive a request for hearing is less than 21 days. C-131. This time period is too short to provide adequate notice via publication. This Court held in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), that a Probate Act limiting the claims period for creditors to file to 60 days after publication was in violation of constitutional provisions of due process without actual notice to reasonably ascertainable creditors. Furthermore, the publication in the instant case was only for one day in a local newspaper. C-130. There can be no reasonable expectation that Dimensions or other affected parties would become aware of the proceedings by this publication.

II.

THE EVIDENCE IN THE RECORD DOES NOT SUPPORT THE DECISION THAT THE PETITIONER RECEIVED NOTICE AND OPPORTUNITY TO BE HEARD.

A. The Illinois Health Facilities Planning Board Disregarded Its Own Rules By Failing To Provide Individual Notice To Affected Parties By Mail.

Title 77 Illinois Administrative Code, Section 1200 contains the notice procedures for public hearings before the Health Facilities Planning Board. These rules were adopted by authority of Section 8 of the Illinois Health Facilities Planning Act. Section 1200.30(c) requires that upon an application for a Certificate of Need, notice by regular mail shall be sent to each "affected person". "Affected person" is defined by that section to include existing health care facilities located in the health service area providing similar services to the proposed project. *Ibid.* It is undisputed that Dimensions was an "affected person" and

entitled to notice of Weil's application by regular mail. C-730. The reason for the mailing is to advise affected persons of their right to request a public hearing and to contest the application. 77 Ill. Admin. Code, Sec. 1200.30 (1992). The public hearing is the only opportunity the statute affords the affected person to challenge a proposed certificate of need.

Administrative proceedings must conform to constitutional requirement of due process of law and due process demands adequate notice of the matter under consideration. *Placko v. Jackson,* 197 Ill. App. 3d 138, 554 N.E. 2d 708 (2nd Dist. 1990). An agency is bound to follow its own rules. *Thomas v. Industrial Commission,* 78 Ill. 2d 327, 399 N.E. 2d 1322 (1980). Adequate notice under the Board's own rules required mailing of notice to Dimensions as an "affected person."

B. The Record Does Not Support The Decision That Notice Was Mailed To Petitioner.

1. Denial Of Receipt Rebuts The Presumption That A Notice Was Mailed.

Two employees of Dimensions testified that it did not receive notice of opportunity to request a public hearing. Alan Snider testified that he is Director of Dimensions Medical Center, Ltd. C-690. On January 11, 1993, Dimensions received an agenda from the Illinois Health Facilities Planning Board for its meeting on January 14-15, 1993. The Board was called and it was verified that Weil's application was on the agenda for consideration. C-694. This was the first time Dimensions was aware through any communication from the Board or Department of Public Health that Weil's Certificate of Need application had actually been filed. C-699. Dimensions immediately sent letters to the Board informing it that Dimensions had not received notice of opportunity to request a

public hearing. C-694-5. A search of Dimensions' records did not locate a notice of opportunity to request a public hearing from the state. C-695-6.

Steve Melega testified that he is associate director of Dimensions Medical Center. C-704. His responsibility included reviewing incoming mail concerning regulatory matters from the Department of Public Health. C-705. The first time he was aware that Weil had filed an application was when Dimensions received the agenda for the January 14, 1993 meeting of the Illinois Health Facilities Planning Board. C-706. No notice of opportunity to request a public hearing was received. C707-708. Mr. Melega had no knowledge that Weil had filed an actual application prior to receiving the Board's agenda on January 11, 1993. C-714. This testimony rebuts the presumption of service of the notice. *Orrway Motor Service v. Illinois Commerce Commission,* 40 Ill. App. 3d 869, 353 N.E. 2d 253 (1st Dist. 1976).

Once the receipt of notice is denied, the burden of proof concerning the issue of whether or not notice was sent is shifted to the party claiming to have sent the notice. This is because that party should be in possession of the evidence necessary to establish the service. *Goetz v. Country Mutual Insurance Co.,* 28 Ill. App. 3d 154, 328 N.E. 2d 109, 115 (2nd Dist. 1975); *Estate of Anderson,* 246 Ill. App. 3d 116, 615 N.E. 2d 1197 (4th Dist. 1993). The burden of proving notice is on the party asserting that it was given. *Brown Bag Co. v. Bituminous Gas Corp.,* 117 Ill. App. 2d 287, 254 N.E. 2d 577 (1st Dist. 1969); *Finley v. Mercer County,* 172 Ill. App. 3d 30, 526 N.E. 2d 635 (3rd Dist. 1988).

2. Proof Of Customary Practice Is Insufficient To Establish Mailing On A Particular Occasion.

Ray Passeri, Executive Secretary of the Board, testified that he is familiar with the procedure with respect to notices sent out in connection with Certificate of Need applications. There are 16 employees in the Board's Certificate of Need program. No one individual has the responsibility for actual mailing. That function is assigned to the support group which is made up of a supervisor and three other individuals. C-717-21. No other witness was called by the Board to testify concerning the purported notice to Dimensions. No individual testified that he was the person who actually performed the mailing.

Mr. Passeri never testified that he had personal knowledge of who mailed the notices for the Weil CON application or indeed if they were mailed. The mailing label list in the file was actually created, printed and produced after the CON was granted, and after the litigation was filed. C-731-2. Passeri asked the support staff to generate a copy of "everyone that would have received notice. The list of mailing labels would not be included in the application file. These were added afterward." C-725-6. Passeri's testimony as to the Board's general business practice concerning mailing notice is insufficient to prove that mailing, in fact, occurred in this particular case. As the court stated in *Goetz v. Country Mutual Insurance Co.*, 28 Ill. App. 3d 154, 328 N.E. 2d 109, 115 (2nd Dist. 1975):

> The rule in Illinois is that proof of a regularly followed business routine is admissible providing there is some evidence that it was followed in the particular case. (*Webb v. Pacific Mutual Life Insurance Co.* (1952), 348 Ill. App. 411, 109 N.E. 2d 258). Where, however, as here, there is no evidence that

> the practice was followed on the particular occasion, proof of the routine is insufficient prove that it was followed in the particular case. *State Bank of East Moline v. Standert* (1948), 335 Ill. App. 519, 524-25, 82 N.E. 2d 393, 396.

In *Willett Motor Coach v. Board of Education,* 103 Ill. App. 3d 760, 431 N.E. 2d 1190 (1st Dist. 1981), the court addressed the issue of adequacy of notice in the public bidding process. The testimony offered was stronger than that in the case at bar. In determining that the proof of notice presented by the Board of Education was inadequate, the court noted that the witness for the Board had no specific recollection of having taken any steps in the notification process nor could he recall having actually mailed the envelopes. The court described the evidence of the Defendant Board of Education concerning the proof of notice on the issue of public bid for a bus contract as follows:

> James Watts, data coder for the Board, testified for the Board and defendants. During the time in question he was responsible for running the bids and labels for the Bureau of Purchases from vendor cards listing vendors for bus transportation. The vendor cards were placed in a machine which automatically printed labels therefrom. Cards should not be removed without a specific direction; he never pulled a card on his own initiative. He always counted the labels to make sure they corresponded to the number of vendor cards. The labeling process would also be used for amendments to the Board solicitations of bids. After labels were produced, they were

> counted to ascertain whether they corresponded to the number of vendors on the list. If so, labels were taken by Watts to personnel to be pasted on envelopes, after which the envelopes were counted and compared to the number of vendor cards, and taken to the mailroom. There, the envelopes are put through a meter stamp machine. He had no specific recollection of having taken any of the steps in the process described above with respect to the amendment at issue, nor could he recall having actually mailed the envelopes. No other witness as to the mailing of the amendment at issue was produced. 431 N.E. 2d 1194-5.

In ruling that such evidence was insufficient to prove the mailing of notice, the court concluded:

> . . . no evidence was presented by the Board that its mailing procedures were actually followed in the instance of the first amendment to bidding procedures under consideration. There was nothing to show that the amendment was mailed to any bidder on this list, whether to Willett or some other entity. The fact that several such notices of amendment were attached to submitted bids does not lead to the inference that they were received by mail; these bidders were also defendants in this case who could have easily supplied evidence at trial that they had received the notices of amendment by mail, and thereby filled this hiatus in proof that existed in the Board's case. 431 N.E. 2d 1196.

In the case at hand, there is no evidence that notice was mailed to anyone. In fact, no mailing list existed prior to the Petitioner filing complaint in this case. Mr. Passeri's testimony, at best, describes a general procedure which he had no participation in. This is not adequate proof of notice as required by *Willett* and *Goetz*. See also *M.S. Kaplan Co. v. Cullerton*, 49 Ill. App. 3d 374, 364 N.E. 2d 381 (1st Dist. 1977). Such lack of proof demonstrates that the decision that proper notice was mailed to Dimensions is not supported by substantial evidence and therefore must be reversed. *Placko v. Jackson*, 197 Ill. App. 3d 138, 554 N.E. 2d 708 (2nd Dist. 1990).

3. There Is No Corroboration That Notice Was Mailed.

Furthermore, the fact that the Board could not produce a contemporaneously created list of the persons it claims were served, (C-725-6) further suggests that there was no proof that notice was given in this particular case. In the normal course of business, there should have been a service list and certification of filing. A certificate of mailing, with a record authenticated by the Post Office, would constitute competent evidence of mailing under 5 ILCS 70/1.25. It should be expected that the Board would maintain records of notices in light of the possibility of future inquiry or litigation. *Goetz v. Country Mutual Insurance Co.*, 28 Ill. App. 3d 154, 328 N.E. 2d 109, 116 (2nd Dist. 1975).

Irregularities on the mailing list produced suggest that proper mailing did not occur. Mr. Passeri testified there is no "rhyme or reason" to the order on the mailing list. C-735. The typing style and size on the label for Dimensions is different than almost all of the other labels. Mr. Passeri testified that the explanation for Dimensions' name having a different type set was that the lists were originally worked up in 1991. After that time, different equipment was used in adding new facilities to

the list. This explanation does not make sense as Dimensions was in existence in 1991, as was for example, Evanston Hospital. The type on the listing for Evanston Hospital is totally different from that showing Dimensions' address. In fact, the Dimensions' listing seems to have been prepared by a person carelessly using pica type with elite spacing.

The statute and Board Rules required that the applicant, Foot and Ankle Surgical Center, be notified by certified mail. Planning Act, Sec. 8, 77 Ill. Admin. Code, Sec. 1200.30(b) (1992). Yet the notice to Foot and Ankle does not contain any indication that notice was sent by certified mail. C-734. Golf Surgical Center was operating an ASTC three miles east of Weil's proposed site. Golf Surgical Center was an "affected person" entitled to notice under the Board's rules. In fact, Golf Surgical Center was providing podiatric surgical services identical to those proposed in Weil's application. Yet Golf Surgical Center is not on the mailing list presented in the record by the Board. C-730, C-738. State legislatures and local public health agencies, which were also required to get individual notice, were not on the service list. C-739, C-740. Interestingly enough, the record is devoid of any evidence that anyone actually received notice. As the court concluded in *Willett Motor Coach Co. v. Board of Education*, 431 N.E. 2d at 1197:

> In the case before us, when Willett's evidence of lack of receipt is considered in contraposition to defendant's lack of evidence showing that the amendment to bid was actually mailed to anyone, we are forced to conclude that the chancellor's conclusion was palpably contrary to the manifest weight of the evidence and must be reversed.

Similarly in the case at hand, the record demonstrates that

the decision of the Board that proper notice had been mailed to Dimensions is not supported by any evidence in the record. The Illinois Appellate and Circuit Court gave undue deference to unsupported factual findings of the Board. This Court addressed a similar issue in the criminal law context in *Thompson v. City of Louisville,* 362 U.S. 199 (1960) holding that the Due Process Clause of the Fourteenth Amendment required evidence in the record to uphold a conviction for a crime. Similarly, in a civil matter, a finding of fact cannot be upheld where there is no evidence in the record to support it.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ANDREW J. CREIGHTON
Counsel of Record
ALLYSON BOULDON
Attorneys for Petitioner
960 Rand Road
Suite 201
Des Plaines, Illinois 60016
(847) 390-9250

APPENDIX A — LETTER FROM THE CLERK OF THE ILLINOIS SUPREME COURT TO ANDREW J. CREIGHTON DENYING PETITION FOR LEAVE TO APPEAL DATED DECEMBER 4, 1996

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

December 4, 1996

Mr. Andrew J. Creighton
Attorney at Law
960 Rand Road
Suite 210
Des Plaines, IL 60016

No. 82074 – Dimensions Medical Center, Ltd., petitioner v. Illinois Health Facilities Planning Board et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 26, 1996.

APPENDIX B — ORDER OF THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT ENTERED SEPTEMBER 10, 1996

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 1-95-3183

DIMENSIONS MEDICAL CENTER, LTD.,

Plaintiff-Appellant

v.

ILLINOIS HEALTH FACILITIES PLANNING BOARD; ILLINOIS DEPARTMENT OF PUBLIC HEALTH; FOOT AND ANKLE SURGICAL CENTER; WEIL PODIATRY SERVICES, LTD.; and LOWELL SCOTT WEIL, D.P.M.,

Defendants-Appellees.

ORDER

This cause coming to be heard on the Petition for Rehearing of Plaintiff-Appellant, Dimensions Medical Center, Ltd., and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the Petition For Rehearing be denied.

DATED at Chicago, Illinois, this 10th day of September, 1996.

Appendix B

s/ Justice Robert Cahill

s/ Justice Thomas E. Hoffman

s/ Justice Mary Jane Theis

APPENDIX C — SUMMARY ORDER OF THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT DATED AUGUST 15, 1996

FOURTH DIVISION
August 15, 1996

[stamped]
NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-95-3183

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 93 CH 1294,

Honorable Ellis E. Reid
Judge Presiding.

DIMENSIONS MEDICAL CENTER, LTD.,

Plaintiff-Appellant,

v.

ILLINOIS HEALTH FACILITIES PLANNING BOARD; ILLINOIS DEPARTMENT OF PUBLIC HEALTH; FOOT AND ANKLE SURGICAL CENTER; WEIL PODIATRY SERVICES, LTD.; and LOWELL SCOTT WEIL, D.P.M.,

Defendants-Appellees.

Appendix C

Appeal from the Circuit Court of Cook County

SUMMARY ORDER

Plaintiff appeals a trial court order affirming the decision of the Illinois Health Facilities Planning Board. The Board granted defendant Weil's application for a certificate of need to construct an ambulatory surgical treatment center.

Plaintiff first argues on appeal that it did not receive proper notice of the opportunity to request a public hearing regarding Weil's application for a permit as required by the Illinois Administrative Code (77 Ill. Admin. Code §§ 1200-30 (1992)). A hearing officer appointed by the Illinois Department of Public Health conducted a hearing to determine whether the Board followed statutory requirements for sending proper notice. The hearing officer found that the Board published the notice of review in the *Des Plaines Journal* and mailed notice of review and opportunity for a public hearing to plaintiff. We found that plaintiff had received constructive and actual notice under the circumstances. The Board adopted the hearing officer's conclusions that the Board followed statutory procedures and sent proper notice of review to plaintiff. The trial court affirmed the Board's decision.

Findings of an administrative agency are *prima facie* true and correct and will not be disturbed by a reviewing court unless they are against the manifest weight of the evidence. 735 ILCS 5/3-110 (West 1992); *Finik v. Department of Employment Security,* 171 Ill. App. 3d 125, 133, 524 N.E.2d 1148 (1992). A decision is against the manifest weight of the evidence when, after viewing the evidence in a light most favorable to the agency, the court determines that no rational trier of fact could

have agreed with the agency's decision. *County of Will v. Illinois State Labor Relations Board,* 220 Ill. App. 3d 62, 65, 580 N.E.2d 887 (1991). The facts and conclusions stated in the Board's decision adequately explain the decision. Here we find the trial court did not err in ruling the evidence sufficient to support the Board's decision.

Second, plaintiff argues that the Board's decision to grant Weil a certificate of need is arbitrary, capricious, and against the manifest weight of the evidence because Weil's application did not meet the Board's published need criteria under section 1110.230 of the Illinois Administrative Code (77 Ill. Admin. Code § 1110.230 (1992)). We find that the facts and conclusions of law stated in the Board's decision adequately explain the decision and that the record shows that the Board's decision to grant the certificate of need is not against the manifest weight of the evidence.

We affirm in accordance with Supreme Court Rule 23(c)(2), (c)(5), and (c)(8). 134 Ill. 2d R. 23 (c)(2), (c)(5), and (c)(8).

Affirmed.

CAHILL, J., with HOFFMAN, P.J., and THEIS, J., concurring.

APPENDIX D — ORDER OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, CHANCERY DIVISION ENTERED AUGUST 4, 1995

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

No. 93 CH 1294
Hon. Ellis E. Reid
Judge Presiding

DIMENSIONS MEDICAL CENTER, LTD.,

Petitioner,

v.

ILLINOIS HEALTH FACILITIES PLANNING BOARD; ILLINOIS DEPARTMENT OF PUBLIC HEALTH; FOOT AND ANKLE SURGICAL CENTER; WEIL PODIATRY SERVICES, LTD; and LOWELL SCOTT WEIL, DPM,

Respondents.

ORDER

This matter coming on to be heard on the petition of Dimensions Medical Center, Ltd. for Administrative Review of the decision of the Illinois Health Facilities Planning Board all parties having appeared, the court having entertained both written submissions and oral argument, having jurisdiction over the subject matter hereof and the parties hereto, and being fully advised in the premises;

Appendix D

I.

Dimensions Medical Center, Ltd., hereinafter referred to as "Dimensions," is a full service ambulatory surgical treatment center. They are engaged in the practice of podiatric services. Dimensions is seeking administrative review of the decision of the Illinois Health Facilities Planning Board which granted a certificate of need which allowed the opening of another ambulatory surgical treatment center in the same location as Dimensions. This certificate of need, based upon the Board's determination that the project is both needed and financially viable, was granted to Weil Podiatry Services and Dr. Lowell Scott Weil, hereinafter collectively referred to as "Weil." The Board found the application complete as of October 21, 1992.

The final decision of the Board was made on January 14, 1993. Dimensions filed their original complaint on February 14, 1993. On November 3, 1993, Judge Thomas J. O'Brien remanded the matter back to the Board for determination as to whether or not Dimensions had been given proper notice.

The hearing on remand was conducted on May 23, 1994 by Hearing Officer Frank Gaughan, duly appointed by the Illinois Department of Public Health. Hearing Officer Gaughan entertained oral testimony as well as written evidentiary submissions. In framing his report to the Illinois Health Facilities Planning Board, Hearing Officer Gaughan addressed the issue framed by Judge O'Brien's order, namely whether or not notice of its right to a public hearing was given to Dimensions. Additionally, pursuant to a request from the Illinois Health Facilities Planning Board, Hearing Officer Gaughan addressed five sub-issues. Specifically, the Board wanted to know [1] whether or not the Planning Board staff followed its normal

notice procedures; [2] whether Dimensions had technical notice by mail; [3] whether Dimensions had constructive notice by publication; [4] whether Dimensions had actual notice of the application; and [5] whether Dimensions had standing to request a continuance of the State Board action, when it had not been granted status as a party to the proceeding.

Hearing Officer Gaughan found that Dr. Weil had caused a letter of intent to be served on other certificate of need holders in the health service area. He also found that Dimension had received the letter, responding to it on June 17, 1992. In their response, Dimensions wrote that the proposed project would have a negative impact on their facility. Hearing Officer Gaughan found that the Board had caused to be published in the Des Plaines Journal a notice of review and opportunity for public hearing. Said notice was published on or about October 28, 1992. Hearing Officer Gaughan further found that on October 22, 1992, the Board, the Illinois Department of Public Health, caused a notice of review and opportunity for public hearing to be mailed to both Dimensions and Defendant Foot and Ankle Surgical Center. The Hearing Officer found that no public hearing was ever held on Weil's certificate of need application. This was due, at least in part, to the fact that Dimensions Medical Center never received the notice of opportunity for public hearing which was placed in the regular United States mail.

Upon hearing the testimony and reviewing all evidentiary submissions, Hearing Officer Gaughan concluded that the Illinois Health Facilities Planning Board had properly followed its rules. Specifically, Hearing Officer Gaughan pointed out that they had published the notice of review in the Des Plaines Journal and mailed the requisite notices to Dimensions and other certificate of need holders. The Hearing Officer concluded that, under all

the attendant facts and circumstances, Dimensions had received technical, constructive and actual notice. The technical notice requirement was complied with when the Board observed the statutory mailing requirements of 77 Illinois Administrative Code 1200.30. They complied with the constructive notice requirements when the notice was published in the newspaper. Additionally, Hearing Officer Gaughan concluded that the Board complied with the actual notice requirements in that Dimensions had actual notice of the pending application for a certificate of need. Finally, Hearing Officer Gaughan concluded that the Board's decision to deny Dimensions' request for a continuance was proper because, at the time the request was made, Dimensions lacked standing to address the Board. Based upon his findings of fact and conclusions of law, Hearing Officer Gaughan recommended that the Board uphold the decision of January 14, 1993.

The hearing officer's report was adopted by the Illinois Health Facilities Planning Board on June 30, 1994.

II.

An administrative decision should not be overturned unless the agency exercised its authority in an arbitrary and capricious manner or the decision is contrary to the manifest weight of the evidence. *Springwood Associates v. Health Facilities Planning Board*, 269 Ill. App. 3d 944 (4th Dist. 1995); citing *Murdy v. Edgar*, 103 Ill. 2d 384 (1984). On review, an administrative agency's findings and conclusions of law are held to be prima facie true and correct. 735 ILCS 5/3-110.

The Illinois Health Facilities Planning Board was the result of the legislature attempting to implement a procedure designed

to reverse the trend of increasing cost of health care resulting from unnecessary construction or modification of health care facilities. 20 ILCS 3960/2. The Board is to authorize the issuance of a permit if it finds [1] the applicant is fit, willing and able to provide a proper standard of health care service for the community with particular regard to the qualification, background and character of the applicant; [2] economic feasibility is demonstrated; [3] safeguards are provided which assure the proposed project is consistent with the public interest; and [4] the proposed project is consistent with the orderly and economic development of such facilities and is in accord with standards, criteria, or plans of need adopted and approved pursuant to section 6 of the Act. *Springwood,* Infra; citing 20 ILCS 3960/6. Because the Board, as an administrative agency, is given substantial discretion in construing and applying its own rules, our role, as a reviewing court, is limited to determining whether the Board's construction and application of this rule is plainly erroneous or inconsistent with long-settled construction. *Charter Medical of Cook County, Inc. v. HCA Health Services of Midwest, Inc.,* 185 Ill. App. 3d 983, 987 (1st Dist. 1989).

III.

In light of the foregoing and all the attendant facts and circumstances, this Court must conclude that the decision of the Health Facilities Planning Board to approve the findings of Hearing Officer Gaughan is neither plainly erroneous nor is it against the manifest weight of the evidence. It is therefore Ordered, Adjudged and Decreed that the decision of the Health Facilities Planning Board is hereby affirmed.

Appendix D

Dated: August 4, 1995

ENTER:

_____

Judge Ellis E. Reid No. 191

APPENDIX E — TRANSCRIPT OF PROCEEDINGS BEFORE THE STATE OF ILLINOIS, HEALTH FACILITIES PLANNING BOARD HELD JUNE 30, 1994

[1] STATE OF ILLINOIS
HEALTH FACILITIES PLANNING BOARD

Hearing held, pursuant to Notice, on the 30th day of June, 1994, at the hour of 4:00 p.m., at Springfield Hilton, 7th at Adams Street, Springfield, Illinois, before the Health Facilities Planning Board.

[2] MADAM CHAIRMAN: Who has read the hearing officer's report in regard to the Foot and Ankle Surgery Center? It's under other business. Hearing Officer report on Foot and Ankle. This is a survey whether you have read the information so we can vote on it. Mrs. Albright?

MRS. ALBRIGHT: Aye.

MADAM CHAIRMAN: Brother Kennedy.

BROTHER KENNEDY: Aye.

MADAM CHAIRMAN: Mr. Schrayer.

MR. SCHRAYER: Aye.

MADAM CHAIRMAN: Mr. Libert.

MR. LIBERT: Yep.

MADAM CHAIRMAN: Dr. Marshall.

DR. MARSHALL: Aye.

MADAM CHAIRMAN: Mrs. Stone.

MRS. STONE: Aye, and I move we adopt the Hearing Officer's Report.

MADAM CHAIRMAN: Mrs. Taylor, Aye. There has been a motion we adopt the Hearing Officer's Report.

MR. LIBERT: Second.

MR. KURSHENBAUM: Second.

MADAM CHAIRMAN: Is there any discussion? Mrs. Albright?

MRS. ALBRIGHT: Aye.

[3] MADAM CHAIRMAN: Brother Kennedy.

BROTHER KENNEDY: Aye.

BROTHER KENNEDY: Mr. Kurshenbaum.

MR. KURSHENBAUM: Aye.

MADAM CHAIRMAN: Mr. Libert.

MR. LIBERT: Yes.

MADAM CHAIRMAN: Mr. Marshall.

MR. MARSHALL: Aye.

MADAM CHAIRMAN: Mrs. Stone.

MRS. STONE: Aye.

MADAM CHAIRMAN: Mrs. Taylor, aye. The Hearing Officer's Report has been adopted.

I would like a motion to Agenda J-2, Drs. Mousavi, Carducci and Brunzie.

MR. MARSHALL: Move for anticipated attendance.

MR. LIBERT: Second.

MRS. STONE: Move to send a formal letter stating that in fact.

MR. MARSHALL: Advisory.

MRS. STONE: We had given an opinion and not a letter of opinion — of exception.

MADAM CHAIRMAN: Is there a second?

MR. LIBERT: Second.

MADAM CHAIRMAN: Mrs. Albright.

[4] MRS. ALBRIGHT: Aye.

MADAM CHAIRMAN: Brother Kennedy.

Appendix E

BROTHER KENNEDY: Aye.

MADAM CHAIRMAN: Mr. Kurshenbaum.

MR. KURSHENBAUM: Aye.

MADAM CHAIRMAN: Mr. Libert.

MR. LIBERT: Yes.

MADAM CHAIRMAN: Dr. Marshall.

DR. MARSHALL: Aye.

MADAM CHAIRMAN: Mrs. Stone.

MRS. STONE: Aye.

MADAM CHAIRMAN: Mrs. Taylor, aye.

Is there anything else to come before the board?

MR. LIBERT: All those in favor of the move to adjourn.

MADAM CHAIRMAN: Move to adjourn. All in favor?

(Aye said in unison.)

* * *

APPENDIX F — HEARING OFFICER'S REPORT AND RECOMMENDATION FROM THE ILLINOIS HEALTH FACILITIES PLANNING BOARD, STATE OF ILLINOIS DATED JUNE 13, 1994

ILLINOIS HEALTH FACILITIES PLANNING BOARD
STATE OF ILLINOIS

Project #92-148

IN RE:

FOOT AND ANKLE SURGICAL CENTER

HEARING OFFICER'S REPORT AND RECOMMENDATION

On May 23, 1994, Hearing Officer Frank I. Gaughan conducted a hearing in this matter. The Illinois Health Facilities Planning Board was represented by Mr. Edward F. Bruno. Dimensions Medical Center Ltd. was represented by R. Steven Polachek. The Foot and Ankle Surgical Center was not represented by any attorney and did not file an Appearance.

This case was remanded to the Illinois Health Facilities Planning Board from the Circuit Court of Cook County, in order to determine whether or not notice of its right to a public hearing was given to Dimensions Medical Center Ltd. in regards to the application for a Certificate of Need filed by the Foot and Ankle Surgical Center.

In addition to that issue, the Board has requested that five sub-issues be addressed. They are: 1) whether or not the Planning Board staff followed its normal notice procedures; 2) whether Dimensions had technical notice by mail; 3) whether

Appendix F

Dimensions had constructive notice by publication; 4) whether Dimensions had actual knowledge of the application; and 5) whether Dimensions has standing to request a continuance of the State Board action, when it has not been granted status as a party to the proceeding.

The procedures governing public hearings in Certificate of Need applications are found in 77 Illinois Administrative Code, Chapter II, Paragraph 1200.30. That section has three requirements. The first is that when the application is deemed complete, the Illinois Health Facilities Planning Board must publish a public notice which shall consist of the identification of the proposed project, the identification of the appropriate recognized area-wide health planning organization, and the time frame for an interested party to request a hearing. The second requirement is that the notice be sent by Certified Mail to the applicant. The third requirement is that the notice be sent to various members of the public by regular mail. This last section specifically requires that the notice of review and opportunity for a public hearing shall also be forwarded by mail to the "affected persons" specifically, any existing health care facilities located in the health service area in which the proposed project is located, that provides services similar to the proposed project.

This notice shall also contain a deadline in which a hearing request must be received by the Health Facilities Planning Board.

Section 1200.40 of the Board rules requires that additional notice be sent if a hearing request is received. Again, this section requires published notice, notice by Certified Mail to the applicant, and notice by regular mail to the affected persons. See the attached Addendum A with the complete rules of Section 1200.

Appendix F

FINDINGS OF FACT

Based on all the evidence presented and based on the credibility of the witnesses, the Hearing Officer finds the following facts:

1. In 1992, the Foot and Ankle Surgical Center filed an application for a Certificate of Need to establish an ambulatory surgical center at 1455 East Golf Road in Des Plaines, Illinois.

2. Lowell Scott Weil, DPM was listed on the application for the Certificate of Need as the president of the Foot and Ankle Surgical Center.

3. At the time of this application, Dr. Weil was on the staff at the Dimensions Medical Center Ltd., also located at 1455 East Golf Road in Des Plaines, Illinois.

4. As part of the Certificate of Need application process, Dr. Weil caused a letter of intent to be served on other Certificate of Need holders in the health service area.

5. Dimensions Medical Center received that letter and responded to it on June 17, 1992 by stating that the proposed project would have a negative impact on their facility. See Board's Exhibit Al.

6. The application for the Foot and Ankle Surgical Center in Des Plaines was deemed complete by the Board on October 21, 1992.

Appendix F

7. On October 28, 1992, the Board caused to be published in the *Des Plaines Journal* a Notice of Review and Opportunity for Public Hearing. See Board's Exhibit A4.

8. On October 22, 1992, the Illinois Health Facilities Planning Board, through the Illinois Department of Public Health, caused a Notice of Review and Opportunity for Public Hearing to be mailed to Dimensions Medical Center Ltd. at 1455 Golf Road, Suite 108, Des Plaines, Illinois 60016. See Board Exhibit A4 and Dimensions Exhibit 1, pgs. 9 and 13.

9. Notice was also sent by regular mail to the Foot and Ankle Surgical Center.

10. On January 11, 1993, Mr. Steven Melega, the Associate Executive Director of Dimensions Medical Center, received an agenda for the Illinois Health Facilities Planning Board meeting scheduled for January 14, 1993.

11. At the Board meeting on January 14, 1993, Dimensions Medical Center Ltd. appeared, through its representatives, and requested a continuance of the board meeting.

12. Prior to the board meeting of January 14, 1993, representatives of Dimensions Medical Center contacted individual board members about the lack of receipt of the Notice for the Opportunity of a Public Hearing.

13. Dimensions Medical Center never requested a public hearing.

14. No public hearing was ever held on this project.

Appendix F

15. No hearing request was ever made by any person or affected party in regards to this project.

16. Dimensions Medical Center Ltd. did not receive the Notice of the Public Hearing, which was sent by regular mail.

CONCLUSIONS OF LAW

Based on the findings of fact, the Hearing Officer makes the following conclusions of law:

1. The Illinois Health Facilities Planning Board properly followed Section 1200.30 of its rules by publishing the Notice of Review and Opportunity for Public Hearing in the *Des Plaines Journal.*

2. The Illinois Health Facilities Planning Board properly followed Section 1200.30 of its rules by mailing the Notice of Review and Opportunity for Public Hearing to Dimensions Medical Center Ltd.

3. Dimensions Medical Center had technical notice by mail, because the Illinois Health Facilities Planning Board complied with the statutory mailing requirements.

4. Dimensions Medical Center had constructive notice of its right to request a hearing, due to the publication in the *Des Plaines Journal.*

5. Dimensions Medical Center had actual knowledge of the application for a Certificate of Need, which was filed by the Foot and Ankle Surgical Center of Des Plaines.

6. Dimensions Medical Center did not have standing to request a continuance of the Board's action on January 14, 1993. This conclusion of law is based on a stipulation entered into by the parties that Dimensions did not having standing.

7. Because Dimensions Medical Center Ltd. had 1) actual knowledge of the application for the Certificate of Need, 2) and because they had constructive notice of their right of review and opportunity for a public hearing due to the publication in the *Des Plaines Journal,* and 3) because the Board followed its procedures in mailing a Notice of Review and Opportunity for Public Hearing to Dimensions Medical Center, the Board's decision not to grant a continuance of its hearing on January 14, 1993 was proper.

RECOMMENDATION

Based on the findings of fact and conclusions of law, the Hearing Officer recommends to the Illinois Health Facilities Planning Board that the Board uphold its decision of January 14, 1993 to deny the continuance, which was requested by Dimensions Medical Center Ltd.

Respectfully Submitted on
this 13th day of June, 1994:

s/ Frank I. Gaughan
FRANK I. GAUGHAN, Hearing Officer